

# LABOR PAINS: THE SEVENTH CIRCUIT DISTORTS THE PREGNANCY DISCRIMINATION ACT TO BAR DISCRIMINATION BASED ON *IN VITRO* FERTILIZATION

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## I. INTRODUCTION

In the last century, women have adopted an increasingly important role in the American labor market.<sup>2</sup> In 1950, only approximately thirty percent of women were active in the workforce.<sup>3</sup> By 2008, the number nearly doubled.<sup>4</sup> Women currently represent an estimated forty-eight percent of the American labor force—the highest percentage in American history.<sup>5</sup>

Despite her increased presence in the workforce, recent census information demonstrates that the average American woman has more children

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1. I owe many thanks to my wife, Dawn Kerner. Without her enduring patience, love, and support this publication, like so much else in my life, would not be possible.

2. Cynthia L. Estlund, *Work and Family: How Women's Progress at Work (and Employment Discrimination Law) May Be Transforming the Family*, 21 COMP. LAB. L. & POL'Y J 467, 467-68 (2000).

3. Susan M. Heathfield, *Women and Work: Then, Now, and Predicting the Future for Women in the Workplace*, About.Com, Human Resources, [http://humanresources.about.com/od/worklifebalance/a/business\\_women.htm](http://humanresources.about.com/od/worklifebalance/a/business_women.htm) (last visited Sept. 6, 2008) (detailing percentages of various groups of birthing-age women in the American workforce and discussing issues relating to American woman's role as mother, head of household, and employee).

4. *See id.* (noting rise of female population in American labor force over time). "In 1950 about one in three women participated in the labor force. By 1998, nearly three of every five women of working age were in the labor force. Among women age 16 and over, the labor force participation rate was 33.9 percent in 1950, compared with 59.8 percent in 1998." *Id.* (citations omitted). *See also* Howard N. Fullerton, Jr., *Labor Force Participation: 75 Years of Change, 1950-98 and 1998-2025*, 122 MONTHLY LAB. REV. 3 (1999) (discussing and charting, in detail, changes to American labor force between 1950 and 1998, and forecasting changes in same labor market through 2025).

5. U.S. Dep't of Labor, Bureau of Labor Statistics, *Women's Share of Labor Force to Edge Higher by 2008*, Feb. 14, 2000, <http://www.bls.gov/opub/ted/2000/feb/wk3/art01.htm> (last visited Apr. 20, 2009) (charting growth in female population amongst workforce from 1988-2008); *see also* U.S. Dep't of Labor, 43 OCCUPATIONAL OUTLOOK Q. 33, 36-37 (1999-2000) (charting decadal changes to percentage of American working women); U.S. Dep't of Labor, Bureau of Labor Statistics, *Changes in Women's Labor Force Participation in the 20<sup>th</sup> Century*, Feb. 16, 2000, <http://www.bls.gov/opub/ted/2000/feb/wk3/art03.htm> (noting and charting differences in labor force participation between women in 1950 and 1998). For a more detailed discussion of changes in the workforce, *see* Fullerton, Jr., *supra* note 4.

now than in years past.<sup>6</sup> For various reasons, many women choose to work while trying to become pregnant, during pregnancy, or immediately or soon after giving birth.<sup>7</sup> Thus, pregnancy-related issues spill over into the workplace and often create conflict between female employees and their employers.<sup>8</sup> Accordingly, the Pregnancy Discrimination Act (PDA),<sup>9</sup> a 1978 amendment to Title VII of the 1964 Civil Rights Act,<sup>10</sup> is as, if not more, relevant today than when it was proposed and adopted.<sup>11</sup>

This note focuses on *Hall v. Nalco Co.*,<sup>12</sup> a recent case of first impression in the Seventh Circuit Court of Appeals. In *Hall*, the court found that, under the PDA, it is discriminatory for an employer to terminate an employee based on the employee's requests for time off to pursue *in vitro* fertilization

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6. U.S. Dep't of Labor, Bureau of Labor Statistics, *Facts For Features*, Mar. 13, 2008, at 1, <http://www.census.gov/Press-Release/www/releases/archives/cb08ff-08.pdf> (noting that in 2006 American total fertility rate was at or above replacement level for the first time since 1971).

7. *Id.* at 4 (noting percentages of working women who were pregnant or recently pregnant). In 2004, fifty-five percent of first-time mothers returned to work within six months of giving birth. *Id.* This is a slight drop from the record high fifty-nine percent recorded in 1998. *Id.* According to the U.S. Census Report, eighty-three percent of first-time mothers resumed working for their former employers within twelve months, and nearly seventy percent returned to the same job or a job which reflects "the same pay, skill level and hours worked per week." *Id.* Furthermore, fifty-five percent of mothers with infants are in the workforce. *Id.* In recent years, the U.S. Census Bureau has commented that women are more likely today to work during and after pregnancy than in years past; it also noted that two-thirds of women who had their first child between 2001 and 2003 worked during pregnancy, as compared with only one half of a similar population in the early 1960s. Press Release, U.S. Census Bureau, Women More Likely To Work During Pregnancy (Feb. 25, 2008), [http://www.census.gov/Press-Release/www/releases/archives/employment\\_occupations/011536.html](http://www.census.gov/Press-Release/www/releases/archives/employment_occupations/011536.html).

8. See National Partnership For Women & Families, *The Pregnancy Discrimination Act: 25 Years Later, Pregnancy Discrimination Persists*, at 2-4, <http://www.nationalpartnership.org/site/DocServer/Pregnancy25thAnnivFacts.pdf?docID=1202> (last visited Mar. 10, 2009) (citing examples of and trends in employment discrimination based upon pregnancy, and issues and procedures relating to pregnancy); see also The U.S. Equal Employment Opportunity Commission, *Pregnancy Discrimination Charges EEOC & FEPAs Combined: FY 1997-FY 2007*, <http://www.eeoc.gov/stats/pregnanc.html> (last visited Sept. 6, 2008) (charting all pregnancy-related discrimination charges filed with EEOC between 1997 and 2007); The U.S. Equal Employment Opportunity Commission, *Pregnancy Discrimination Charges EEOC & FEPAs Combined: FY 1992 - FY 1996*, <http://www.eeoc.gov/stats/pregnanc-a.html> (last visited Sept. 6, 2008) (charting all pregnancy-related discrimination charges filed with EEOC between 1992 and 1996). The EEOC charts demonstrate a 65% rise in pregnancy discrimination charges over fifteen years of recorded datum.

9. Act of Oct. 31, 1978, Pub. L. No. 95-555, 92 Stat 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2007)).

10. 42 U.S.C. § 2000e (2007).

11. National Partnership For Women & Families, *supra* note 8, at 1.

<sup>12</sup> 534 F.3d 644 (7th Cir. 2008).

treatments.<sup>13</sup> Because Hall presented sufficient facts for a jury to consider, the court thus reversed a grant of summary judgment for Nalco and remanded the case to the district court for review.

While reversal of summary judgment was appropriate, the court engaged in faulty reasoning.<sup>14</sup> Discrimination charges and claims filed under the PDA must fall under the umbrella of gender-specific discrimination.<sup>15</sup> Accordingly, Hall's claim should have failed because, as the Supreme Court and Federal Courts of Appeal have noted, infertility is a gender-neutral condition.<sup>16</sup> Without an additional showing of sex discrimination, Hall's claim does not fall under the umbrella of Title VII or PDA protections.<sup>17</sup>

Part II of this note details the history of the 1964 Civil Rights Act, Title VII of the Civil Rights Act, the PDA and the cases that inform and follow each.<sup>18</sup> Part III examines the facts, procedural history, and holding in *Hall v. Nalco Co.*<sup>19</sup> Part IV details the Seventh Circuit Court of Appeal's holding that summary judgment was inappropriate where the plaintiff presented a cognizable discrimination claim against her former employer.<sup>20</sup> Finally, Part V analyzes: (1) how the court's reasoning in the *Hall* decision was misinformed, and the potential effect on Hall's case; and (2) why this decision, if followed, will have a chilling effect as future courts examine protections relating to gender-specific medical conditions.<sup>21</sup>

## II. BACKGROUND

### A. Conception of the 1964 Civil Rights Act

In a 1963 speech, President John F. Kennedy announced his plan to end racial tension and discrimination in the United States.<sup>22</sup> The Kennedy

13. *Id.* at 648-49 (holding that *in vitro* fertilization procedures are related to pregnancy and that, as such, the PDA bars discrimination on basis of *in vitro* fertilization). For a more detailed discussion of the court's holding, see *infra* notes 149-61 and related text.

14. For critical analysis of the court's holding and rationale, see *infra* notes 175-93 and related text.

15. For an explanation as to why such claims must be gender specific, see *infra* notes 73-80 and related text.

16. For an explanation of why a showing of infertility alone does not warrant protection of Title VII, see *infra* notes 95-120 and related text.

17. For an analysis demonstrating why Hall's claim should fail without an additional showing of gender-specific discrimination, see *infra* notes 175-93 and related text.

18. For a more detailed description of the history and importance of Title VII of the 1964 Civil Rights Act and the PDA, see *infra* notes 23-120 and related text.

19. For pertinent facts relating to the history and disposition of *Hall v. Nalco*, see *infra* notes 121-48 and related text.

20. For a discussion of the Seventh Circuit's holding and rationale, see *infra* notes 149-61 and related text.

21. For critical analysis and application, see *infra* notes 162-93 and related text.

22. John F. Kennedy, U.S. President, Radio and Television Report to the American People on Civil Rights (June 11, 1963),

administration's proposed civil rights bill was introduced in the House of Representatives the following day.<sup>23</sup> Interestingly enough, the original bill did not prohibit gender-based discrimination, nor did it bar private employers from discriminating based on protected class.<sup>24</sup> Instead, Title VII of the original bill merely established the Equal Employment Opportunity Commission, whose primary function was to prevent discrimination by recipients of federal grants, contractors with the federal government, and the federal government itself.<sup>25</sup>

Following the Kennedy assassination, President Johnson championed Kennedy's civil rights bill.<sup>26</sup> The final version of the bill, however, was

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<http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Speeches/JFK/003POF03CivilRights06111963.htm>. In relevant part, President Kennedy announced that:

It ought to be possible for American consumers of any color to receive equal service in places of public accommodation, such as hotels and restaurants and theaters and retail stores, without being forced to resort to demonstrations in the street, and it ought to be possible for American citizens of any color to register to vote in a free election without interference or fear of reprisal.

It ought to be possible, in short, for every American to enjoy the privileges of being American without regard to his race or his color. In short, every American ought to have the right to be treated as he would wish to be treated, as one would wish his children to be treated. But this is not the case.

... In a time of domestic crisis men of good will and generosity should be able to unite regardless of party or politics. This is not even a legal or legislative issue alone. It is better to settle these matters in the courts than on the streets, and new laws are needed at every level, but law alone cannot make men see right.

We are confronted primarily with a moral issue. It is as old as the scriptures and is as clear as the American Constitution.

*Id.*

23. Michael Evan Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth*, 19 DUQ. L. REV. 453, 455 (1981) (detailing general history of Title VII's ban against sex discrimination). Representative Celler, from New York, introduced the bill as H.R. 7152. *Id.*

24. *Id.* at 454 (discussing absence of Title VII from Representative Celler's original House version of the 1964 Civil Rights Act). President Kennedy likely intended H.R. 7152 only to end racial disharmony in the United States, and did not envision an end to gender-based discrimination. Furthermore, the H.R. 7152 did not extend protection to employees of private enterprises against employment discrimination as it does today. *Id.* at 454-55. Had President Kennedy or Representative Celler called for a ban on employment discrimination by private employers, H.R. 7152 was much less likely to pass through Congress. *Id.* (discussing opposition to the civil rights bill, particularly as arising from southern states).

25. *Id.* at 455. It has been noted that the Equal Employment Opportunity Commission "had power to do little more than order conciliation until the Equal Employment Opportunity Act of 1972 gave it significant enforcement powers." MARCIA MOBILIA BOUMIL & STEPHEN C. HICKS, *WOMEN AND THE LAW* 397 (Fred B Rothman & Co. 1992).

26. See Ted Gittinger & Allen Fisher, *LBJ Champions the Civil Rights Act of 1964*, 36 PROLOGUE (2004), available at <http://www.archives.gov/publications/prologue/2004/summer/civil-rights-act-1.html> (detailing President Johnson's trials and tribulations while attempting to pass the Civil Rights Act through Congress).

broad than the original.<sup>27</sup> While Kennedy initially intended only to end racial discrimination, Congressman Howard Smith added provisions to the bill which prohibited employment discrimination based on sex.<sup>28</sup> The final version of the bill, which included clauses barring both racial and sex-based discrimination, was passed in both the House and Senate, and was fully realized as the 1964 Civil Rights Act.<sup>29</sup>

The Supreme Court quickly began to interpret the Civil Rights Act. The Court's findings in *Griggs v. Duke Power Co.*,<sup>30</sup> in which the Court examined Duke Power's allegedly discriminatory hiring practices to determine whether they violated Title VII, served as a backdrop to the PDA.<sup>31</sup> Prior to the adoption of the Civil Rights Act, Duke Power separated its employees based on race.<sup>32</sup> Following passage of the Act, however, Duke Power amended its policy and instead required employees who wished to transfer into higher pay workgroups to have a high school degree and pass a series of aptitude tests.<sup>33</sup> The aptitude tests were general intelligence tests, and did not approximate skill sets specific to each job.<sup>34</sup> The Court found that the new policy effectively created a racial divide in Duke Power's workforce.<sup>35</sup> While the job criteria were the same for people of all races, the job criteria were arbitrary and strongly disfavored African-American employees, many of whom did not have

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27. See Jo Freeman, *How "Sex" Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163 (1991).

28. *Id.* Congressman Smith's proposition was formally adopted as Title VII of the 1964 Civil Rights Act. See 48 U.S.C. § 2000e (2007). Congressman Smith commented that he intended the proposition "to prevent discrimination against another minority group, the women . . . ." 110 CONG. REC. H2577 (daily ed. Feb. 8, 1964). Congressman Smith's motives in introducing sex to the bill have been much debated; many believe that Smith, a Virginia senator with strong ties to Southerners, introduced the prohibition against gender-based discrimination in order to stymie passage of the Civil Rights Act. See Freeman, *supra* note 27, at 164; see also, e.g., CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 238 (Seven Locks Press 1985); Gold, *supra* note 23, at 458-59 (noting support for the view that Smith added "sex" to the bill, intending to "ridicule the bill to death"). Other commentators argue, however, that Congressman Smith genuinely believed that the proposed changes were necessary. See Gold, *supra* note 23, at 466 (discussing Smith's later commentary about the addition of "sex" to Title VII and discussing his motivations).

29. See 42 U.S.C. § 2000e.

30. 401 U.S. 424 (1971).

31. *Id.* (examining Duke Power's labor force structure and concluding that, as it stood, the labor structure was discriminatory).

32. *Id.* at 427 (explaining that Duke Power had five separate labor groups at the plant in question, and African-American employees were only allowed to work in the lowest paying group).

33. *Id.* at 427-28. While Duke Power enacted rules that required employees to meet a series of qualifiers to work in the predominantly Caucasian work groups, no such qualifiers were necessary to continue working in the predominantly African-American workgroup. *Id.*

34. *Id.* at 428.

35. *Id.* at 428, 436.

high school degrees.<sup>36</sup> Thus, the Court found that Duke Power's new policy violated Title VII because it effectively barred many African-American employees from seeking positions for which they may otherwise have been qualified, based on race.<sup>37</sup>

The Court was careful to note, however, that in enacting Title VII, Congress did not intend "to guarantee a job for every person regardless of qualifications."<sup>38</sup> Instead, the Court made clear that the effect of Title VII was to eliminate "artificial, arbitrary, and unnecessary barriers to employment" when those barriers existed only to discriminate on the basis of classification as members of a protected group.<sup>39</sup> Thus, the Court did not bar the use of testing or measuring procedures in the workplace; it merely restricted the use of such mechanisms to those which reasonably measure or indicate one's job performance.<sup>40</sup>

### *B. Birth of the PDA*

Both prior to and after the passage of the 1964 Civil Rights Act, the Supreme Court issued opinions which support Congress' intent for adopting the PDA.<sup>41</sup> The earliest of these Supreme Court cases was *Muller v. Oregon*,<sup>42</sup> in which the Court considered the constitutionality of an Oregon law which prohibited women from working in certain facilities for more than ten hours a day.<sup>43</sup>

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36. *Id.* at 427-28.

37. *Id.* at 431. Since only a small percentage of the African American population met the initial qualifier, the new policy was discriminatory in effect although it was not discriminatory on its face. *Id.*

38. *Id.* at 430.

39. *Id.* at 431.

40. *Id.* at 436. The Court noted Congress' acceptance of prerequisites to employment that served a useful and necessary function. *Id.* (stating that "Congress has commanded . . . that any tests used must measure the person for the job and not the person in the abstract."); see also *id.* at 436 n.12 (citing congressional record to determine legislative intent). Additionally, Chief Justice Burger noted that the legislative history of the Act indicated that job-related tests were permissible, where "such test is designed to determine or predict whether such individual is suitable or trainable with respect to his [or her] employment." *Id.* The *Griggs* Court further found that employers should bear the burden of proving the business need for any discriminatory practices. *Id.* at 432. This was later codified in a 1991 amendment to the Civil Rights Act. Thus, employers may discriminate based on an individual's religion, sex, or national origin where those qualities constitute "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . ." 42 U.S.C. § 2000e-2(e)(1) (2007); see also MICHAEL J. ZIMMER; CHARLES A. SULLIVAN & REBECCA HANNER WHITE, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 172-73 (7th ed. 2008) (discussing impact of BFOQ on Title VII and Age Discrimination in Employment Act).

41. See, e.g., *supra* note 30 and *infra* notes 42, 45 and related text (detailing Supreme Court cases which lay groundwork for or interpret the PDA).

42. 208 U.S. 412 (1908).

43. *Id.* at 416-17. As stated by the court, the Oregon law read:

Muller, an owner of an Oregon laundry facility, appealed from a state court ruling against him under the Oregon law.<sup>44</sup> He argued that the Court's earlier decision in *Lochner v. U.S.*<sup>45</sup> controlled, because the Court held in *Lochner* that the Due Process Clause of the Fourteenth Amendment barred government interference in private employment contracts unless the health or safety of workers was at issue.<sup>46</sup>

Justice Brewer affirmed on behalf of a unanimous court and, in so doing, upheld the statute and distinguished *Muller* from *Lochner* based on "the difference between the sexes."<sup>47</sup> Citing several cases in which the Court held that government interference in private contract matters was appropriate, the Court stated:

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.<sup>48</sup>

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Sec. 1. [N]o female (shall) be employed in any mechanical establishment, or factory, or laundry in this State more than ten hours during any one day. The hours of work may be so arranged as to permit the employment of females at any time so that they shall not work more than ten hours during the twenty-four hours of any one day.

*Id.*

Section three of the same law held that violation of the first section should be punished by fines ranging from ten to twenty-five dollars. *Id.* at 417.

44. *Id.* Local authorities fined Muller \$10 after they discovered that he employed women, and either allowed or mandated that the women work more than ten hours in a given twenty-four hour period. *Id.*

45. 198 U.S. 45 (1905).

46. *Id.* at 53. The Due Process clause of the Fourteenth Amendment protects against state-sanctioned deprivation of "life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

47. *Muller*, 208 U.S. at 419.

48. *Id.* at 421. Justice Brewer, relying on a brief for the defendant submitted by Louis Brandeis, commented at length that nineteen states and at least seven other countries had enacted similar legislation to prevent women from working long hours in factories and laundry shops. *Id.* at 419 n.1. He further noted that:

The reasons for the reduction of the working day to ten hours-(a) the physical organization of women, (b) her maternal functions, (c) the rearing and education of the children, (d) the maintenance of the home-are all so important and so far reaching that the need for such reduction need hardly be discussed.

*Id.* (internal quotations omitted).

Following the adoption of the 1964 Civil Rights Act, the Supreme Court invoked the Due Process clause of the Fourteenth Amendment to strike down a statute because it discriminated based on gender in *Reed v. Reed*.<sup>49</sup> In *Reed*, the Court examined an Idaho statute which afforded preferential treatment in probate matters to men, based solely on gender.<sup>50</sup> The Court held that the statute was unconstitutionally discriminatory.<sup>51</sup> It found that the Idaho statute—which specified that “males must be preferred to females”<sup>52</sup> in appointing estate administrators—was arbitrary, and accordingly did not bear a rational relationship to legitimate state objectives.<sup>53</sup>

Just three years later, the Court decided *Geduldig v. Aiello*.<sup>54</sup> In *Geduldig*, California funded a disability insurance program for employees of private companies who needed to take time off from work for a temporary disability and could not collect under a worker’s compensation plan.<sup>55</sup> Under the plan, women were not entitled to collect money while they were out of work for pregnancy or conditions arising from or relating to pregnancy.<sup>56</sup> The Court upheld the constitutionality of California’s disability insurance program, relying primarily on the financial and social welfare qualities of the existing

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49. 404 U.S. 71 (1971). See SUPREME COURT DECISIONS & WOMEN’S RIGHTS: MILESTONES TO EQUALITY (Claire Cushman ed., Congressional Quarterly Inc. 2000) (discussing the facts and historical import of the Supreme Court’s *Reed* decision).

50. *Reed*, 404 U.S. at 73. According to the Court, the state law in question provided that:

Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, and they are respectively entitled thereto in the following order: 1. The surviving husband or wife or some competent person whom he or she may request to have appointed. 2. The children. 3. The father or mother. 4. The brothers. 5. The sisters. 6. The grandchildren. 7. The next of kin entitled to share in the distribution of the estate. 8. Any of the kindred. 9. The public administrator. 10. The creditors of such person at the time of death. 11. Any person legally competent. If the decedent was a member of a partnership at the time of his decease, the surviving partner must in no case be appointed administrator of his estate.

*Id.* at 73 n.2.

51. *Id.* at 76-77.

52. *Id.* at 73.

53. *Id.* at 75-76 (recognizing states’ right to discriminate against certain classes of people so long as discrimination rests upon “some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike”) (internal citations and quotation marks omitted).

54. 417 U.S. 484 (1974).

55. *Id.* at 486.

56. *Id.* at 489. As enacted in 1953, the California Insurance Code provided that “[d]isability” or “disabled” includes both mental or physical illness and mental or physical injury. . . . In no case shall the term “disability” or “disabled” include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of [twenty-eight] days thereafter.” CAL. UNEMP. INS. CODE § 2626 (1971).

structure.<sup>57</sup> The Court distinguished the case from *Reed*, finding that discrimination on the basis of pregnancy was not the equivalent of discrimination against a protected class.<sup>58</sup> Notably, the Court stated that “[w]hile it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those in *Reed* . . . .”<sup>59</sup>

Justice Brennan, writing for the dissent, disagreed.<sup>60</sup> He argued that disabilities arising from or relating to pregnancy should have been covered by the California insurance plan.<sup>61</sup> Justice Brennan relied heavily on the findings of the Equal Employment Opportunity Commission’s *amicus curiae* brief, which concluded that temporary pregnancy-related disabilities were functionally equivalent to other temporary disabilities.<sup>62</sup> The Commission argued, and Justice Brennan agreed, that pregnancy, like those illnesses and injuries recognized and covered as disabilities under the California plan, impacted employees’ ability to perform their job function.<sup>63</sup>

Brennan voiced similar discontent with a system which failed to protect pregnant women from gender-based discrimination in *General Electric Co. v. Gilbert*,<sup>64</sup> where the majority held that Title VII did not prohibit an employer from terminating an employee on the basis of pregnancy.<sup>65</sup> General Electric

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57. *Geduldig*, 417 U.S. at 493-96 (justifying the legality of California’s disability insurance program through examination of fiscal and social costs of expanding program to include coverage of pregnancy-related disability claims).

58. *Id.* at 496-97.

There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class . . . from the program. There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.

*Id.*

The Court noted that the California plan did not discriminate on the basis of gender, but instead elected to limit the disabilities covered by the plan by removing a “physical condition-pregnancy” from the list of covered conditions. *Id.* at 496 n.20.

59. *Id.* at 496 n.20.

60. *Id.* at 497 (Justice Brennan, joined by Justices Douglas and Marshall, dissenting from majority opinion).

61. *Id.* at 500-01 (noting that economic impact of pregnancy-related disabilities was indistinguishable from those caused by other disabilities). Justice Brennan wrote that “by singling out for less favorable treatment a gender-linked disability peculiar to women, the State has created a double standard for disability compensation . . . [one that] inevitably constitutes sex discrimination.” *Id.*

62. *Id.* at 502.

63. *Id.* at 504 n.8; Brief for Equal Employment Opportunity Commission as Amicus Curiae Supporting Respondent, *Geduldig v. Aiello*, 417 U.S. 484 (1974).

64. 429 U.S. 125 (1976).

65. *Id.* at 125-46. Justice Brennan correctly noted that the Court’s decision rebuked the unanimous opinion of the federal courts of appeal that recently heard and ruled on similar cases. *Id.* at 147. See, e.g., *Comm’n Workers v. Am. Tel. & Tel. Co.*, 513 F.2d 1024 (2d Cir. 1975); *Wetzel v. Liberty Mut. Ins. Co.*, 511 F.2d 199 (3d Cir. 1975); *Gilbert v. Gen.*

extended pay and benefits to disabled employees, but elected not to extend similar benefits to women seeking temporary disability pay due to pregnancy or pregnancy-related issues.<sup>66</sup> In his dissent, Justice Brennan again argued that the Court was wrong to find that discrimination based on pregnancy was not gender-based discrimination barred by Title VII.<sup>67</sup> He noted that General Electric labeled pregnancy as a "voluntary disability" while still electing to include other "voluntary disabilities" such as attempted suicide, injuries stemming from sports, and venereal disease.<sup>68</sup>

In response to *General Electric*, Congress passed the PDA as an amendment to Title VII.<sup>69</sup> Title VII already barred discrimination "because of sex."<sup>70</sup> The PDA thus clarified that:

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*Elec. Co.*, 519 F.2d 661 (4th Cir. 1975); *Satty v. Nashville Gas Co.*, 522 F.2d 850 (6th Cir. 1975); *Hutchinson v. Lake Oswego Sch. Dist. No. 7*, 519 F.2d 961 (9th Cir. 1975).

66. *Gilbert*, 429 U.S. at 127.

67. *Id.* at 147-60. Justice Brennan stated that "it offends common sense to suggest . . . that a classification revolving around pregnancy is not, at the minimum, strongly 'sex related.'" *Id.* at 149. Justice Brennan further stated that:

The Court's belief that the concept of discrimination cannot reach disability policies effecting "an additional risk, unique to women . . .," is plainly out of step with the decision three Terms ago in *Lau v. Nichols*, interpreting another provision of the Civil Rights Act. There a unanimous Court recognized that discrimination is a social phenomenon encased in a social context, and therefore, unavoidably takes its meaning from the desired end products of the relevant legislative enactment, end products that may demand due consideration to the uniqueness of "disadvantaged" individuals. A realistic understanding of conditions found in today's labor environment warrants taking pregnancy into account in fashioning disability policies. Unlike the hypothetical situations conjectured by the Court, contemporary disability programs are not creatures of a social or cultural vacuum devoid of stereotypes and signals concerning the pregnant woman employee. . . . [T]he company has devised a policy that, but for pregnancy, offers protection for all risks, even those that are "unique to" men or heavily male dominated. In light of this social experience, the history of General Electric's employment practices, the otherwise all-inclusive design of its disability program, and the burdened role of the contemporary working woman, the EEOC's construction of sex discrimination under

§ 703(a)(1) is fully consonant with the ultimate objective of Title VII, "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered [sexually] stratified job environments to the disadvantage of [women]."

*Id.* at 159-60 (internal footnotes, citation, emphasis and star pagination omitted).

68. *Id.* at 151.

69. Julie Manning Magid, *Pregnant With Possibility: Reexamining the Pregnancy Discrimination Act*, 38 AM. BUS. L.J. 819, 820 (2001).

70. 42 U.S.C. § 2000e-2(a)(2) (2007) ("It shall be an unlawful employment practice for an employer . . . to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of . . . sex . . .").

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .<sup>71</sup>

In enacting the PDA, Congress sought to clarify that Title VII protected women from discrimination based on “pregnancy, childbirth, and related medical conditions.”<sup>72</sup>

### *C. After Enactment of the PDA: Filing Discrimination Claims Under Title VII*

In an employment discrimination action under Title VII, the plaintiff must demonstrate that he or she is a member of a protected class.<sup>73</sup> Gender is one such class.<sup>74</sup> Proving gender alone, however, is not enough. The plaintiff must further demonstrate that he or she suffered discrimination on the basis of membership in that class.<sup>75</sup>

Following passage of the PDA, the Supreme Court espoused a “simple test” for gender-based discrimination under Title VII: the plaintiff must show that the employer treated an employee “in a manner which but for that person’s sex would be different.”<sup>76</sup> In recent years, the test has been amended to also

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71. § 2000e(k).

72. *Id.* (barring discrimination on basis of “pregnancy, childbirth, and related medical conditions”). Senator Williams, one of the sponsors of the Act, explained that it was designed “to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life.” 123 CONG. REC. 29658 (daily ed. Sept 16, 1977). Representative Tsongas also commented that it was meant to “put an end to an unrealistic and unfair system that forces women to choose between family and career – clearly a function of sex bias in the law.” 124 CONG. REC. 21440, 21442 (1978).

73. The EEOC defines “protected class” as “groups protected from the employment discrimination by law,” which include “men and women on the basis of sex; any group which shares a common race, religion, color, or national origin; people over 40; and people with physical or mental handicaps.” See EEO Terminology, <http://www.archives.gov/eo/terminology.html> (last visited Mar. 30, 2009); see also 42 U.S.C. § 2000e-2(a)(1) (“It shall be an unlawful employment practice for an employer to fail or to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex or national origin”) (emphasis added).

74. See EEO Terminology, *supra* note 73 (“These groups include men and women on the basis of sex. . .”).

75. See, e.g., *Vitug v. Multistate Tax Com’n*, 88 F.3d 506, 517 (7th Cir. 1996) (noting that Title VII claims require plaintiff to prove that he or she was discriminated against because of membership in a protected class).

76. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 683 (1983).

include "mixed motive" cases, where the employer's actions were motivated by both legitimate and illegitimate rationale.<sup>77</sup>

By way of example, in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*,<sup>78</sup> the Court held that excluding pregnancy coverage from an otherwise inclusive insurance benefits plan was discriminatory under Title VII and the PDA.<sup>79</sup> The Court found further that Congress' clear intent in passing the PDA was to clarify that "for all Title VII purposes, discrimination based on a woman's pregnancy was, on its face, discrimination because of her sex."<sup>80</sup>

Nevertheless, pregnancy may not provide a successful basis for recovery in every employment discrimination suit.<sup>81</sup> For example, in *Maldonado v. U.S.*

77. 42 U.S.C. § 2000e-2(m) ("[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice") (emphasis added). For greater legislative and judicial history of the move from a "but-for" to a more lenient "mixed-motive" test, see ZIMMER, SULLIVAN & HANNER WHITE, *supra* note 40 (providing notes and commentary on "'Direct' vs. 'Circumstantial' Evidence" and explaining the Court's decision-making process).

78. 462 U.S. 669 (1983).

79. *See id.* at 683-84 (demonstrating that Congress, through the PDA, resolved the question of whether it is discriminatory to limit benefits or insurance coverage relating to pregnancy where the policy otherwise is inclusive). Lower courts have since espoused the view that such employment discrimination must involve compensation. *See Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1388-89 (11th Cir. 1998) (contrasting direct compensation and benefits plans with employee grooming policy which "related more closely to the employer's choice of how to run his business than to equality of employment opportunity") (quoting *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084 (11th Cir. 1975)).

80. *Newport News*, 462 U.S. at 684. *Newport* is also an important case for its holding that male employees can successfully file Title VII discrimination claims under the PDA. *See id.* ("[S]ince the sex of the spouse is always the opposite of the sex of the employee, it follows inexorably that discrimination against female spouses in the provision of fringe benefits is also discrimination against male employees."); accord *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 147 (1980). Justice Rehnquist, writing for the dissent, pointed to the Congressional Record to demonstrate that the PDA covered only female employees affected by pregnancy, and did not cover the spouses or dependents of male employees. *See Newport News*, 462 U.S. at 691-94 (quoting dialogue between Congressmen Williams and Hatch which indicates legislative intent to cover only female employees, and not female dependents of employees).

81. Compare *Maldonado v. U.S. Bank*, 186 F.3d 759 (7th Cir. 1999) (holding that an employer may not discriminate on basis of applicant's pregnancy when applicant has not indicated that she will require leave of absence) and *Byrd v. Lakeshore Hosp.*, 30 F.3d 1380 (11th Cir. 1994) (holding that employer hospital's discharge of employee, who had applied accrued sick time to days taken to deal with pregnancy-related complications, was discriminatory) with *Stout v. Baxter Healthcare Corp.*, 282 F.3d 856 (5th Cir. 2002) (holding that, where employer had a "no-leave" policy for all employees, pregnant women could not claim discrimination under such policy because "[t]o hold otherwise would be to transform the PDA into a guarantee of medical leave for pregnant employees, something we have specifically held that the PDA does not do.") and *Marafino v. St. Louis County Cir. Ct.*, 707 F.2d 1005 (8th Cir. 1983) (holding that court's refusal to hire pregnant woman who needed near immediate leave of absence as law clerk was not gender-based discrimination because court would not have hired any applicant who required such leave of absence immediately after hire).

*Bank and Manufacturers Bank*,<sup>82</sup> the court followed *Newport News*, but held that under the PDA employers do not owe any additional rights to pregnant employees; rather, they are only required to extend the same rights and privileges to pregnant employees as to all others.<sup>83</sup> Accordingly, the employer at issue was not permitted to deny employment to a pregnant applicant based on a presumption that she would need time off.<sup>84</sup> The employer might, however, have been permitted to hire a non-pregnant applicant over a pregnant applicant if the position applied for required a Bona Fide Occupational Qualification (BFOQ) that pregnant women could not meet.<sup>85</sup> *Maldonado* also reinforced that an employer may set expectations or policies which in effect discriminate against employees who are pregnant or who suffer from pregnancy-related temporary disability, so long as they can demonstrate that such discrimination is necessary as it relates to job performance.<sup>86</sup>

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82. 186 F.3d 759 (7th Cir. 1999).

83. See *id.* at 762 (explaining that pregnant female employees were not entitled to special treatment, but instead are subject to the same treatment, good or bad, as all other employees). See also 29 C.F.R. § 1604 App. (Questions and Answers, No. 5); *Tysinger v. Police Dep't of Zanesville*, 463 F.3d 569, 575 (6th Cir. 2006) ("the Pregnancy Discrimination Act does not require preferential treatment for pregnant employees. Rather, it mandates . . . the same [treatment received by] nonpregnant employees."); *Kennedy v. Schoenberg, Fisher & Newman, Ltd.*, 140 F.3d 716, 722 (7th Cir. 1998); *Troupe v. May Dep't. Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994); Lisa Baker, *Pregnancy Discrimination Act Guarantee of Equal Treatment, Not Preferential Treatment*, L. ENFORCEMENT BULL. (2008), <http://www.fbi.gov/publications/leb/2008/march2008/march2008leb.htm> (last visited Oct. 16, 2008). In *Troupe*, the Seventh Circuit stated that "[e]mployers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees, even to the point of conditioning the availability of an employment benefit on an employee's decision to return to work after the end of the medical disability that pregnancy causes." 20 F.3d at 738.

84. See *Maldonado*, 186 F.3d at 766, 768 (discussing employer's rights and obligations with respect to pregnant employees and applicants).

85. See *id.* at 763. If an employer demonstrates need for a BFOQ, it may discriminate on the basis of sex. See Dianna Johnston, *EEOC Informal Discussion Letter*, [http://www.eeoc.gov/foia/letters/2002/titlevii\\_bfoq.html](http://www.eeoc.gov/foia/letters/2002/titlevii_bfoq.html) (Mar. 5, 2002). For an employer to establish a BFOQ, the employer must have a "basis in fact" for its belief that gender-based discrimination is necessary. *Id.* (citing *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977)). Recently, the Seventh Circuit Court of Appeals demonstrated that courts should narrowly interpret the BFOQ exception. See Mitchell H. Rubenstein, Adjunct Law Professor Blog, *7th Once Again Demonstrates How Narrow BFOQ Defense Is*, <http://lawprofessors.typepad.com/adjunctprofs/2008/09/7th-once-again.html> (Sept. 18, 2008).

86. See *Maldonado*, 186 F.3d at 766.

*D. Pink, Blue, or Gender Neutral?: In Vitro Fertilization's Relation to Title VII and the PDA*1. A Primer on Infertility and *In Vitro* Treatments

While definitions vary slightly, infertility is generally understood as one's inability to conceive a child.<sup>87</sup> It is one of the most common reasons that women between the ages of twenty to forty-five visit their doctors.<sup>88</sup> Medical experts note, however, that infertility affects both men and women in approximately equal proportions.<sup>89</sup> Approximately one-in-five to one-in-seven couples will struggle to conceive a child.<sup>90</sup> As a result, fertility treatments are increasingly more common.<sup>91</sup>

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87. See Human Fertilisation & Embryology Authority, *The Scale of Fertility Problems*, [http://www.hfea.gov.uk/en/406.html#The\\_scale\\_of\\_fertility\\_problems](http://www.hfea.gov.uk/en/406.html#The_scale_of_fertility_problems) (last visited Apr. 1, 2009) (noting that National Institute for Clinical Excellence defines infertility as the inability to get pregnant after two continuous years of unprotected sex); see also Merck Manual Home Edition, Infertility, Introduction, <http://www.merck.com/mmhe/sec22/ch254/ch254a.html?qt=infertility&alt=sh> (last visited Apr. 1, 2009) ("Infertility is the inability of a couple to achieve pregnancy after repeated intercourse without contraception for [one] year.").

88. See Human Fertilisation & Embryology Authority, *supra* note 87 (noting scope, annually, of fertility issues for women in United Kingdom). The British Human Fertilisation & Embryology Authority (HFEA) estimates that one in seven women will have problems conceiving a child at some point in their lives. *Id.* In America, it is estimated that twelve percent of women of childbearing age have received fertility treatments of some sort. See U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES CENTERS FOR DISEASE CONTROL AND PREVENTION, 2004 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 3 (2006), <http://ftp.cdc.gov/pub/Publications/art/2004ART508.pdf> (noting infertility rates among American men, women, and couples).

89. Vaclav Insler & Bruno Lunenfeld, *Infertility: the dimensions of the problem*, in *INFERTILITY, MALE AND FEMALE* 5-6 (Vaclav Insler & Bruno Lunenfeld eds., 2d ed. 1993) (noting that 40-60% of infertility cases are attributable to female causes); Male Infertility Best Practice Pol'y Comm. of Am. Urological Ass'n and Practice Comm. of Am. Soc. for Reprod. Med., *Report on the optimal evaluation of the infertile male*, 86(4) FERTILITY AND STERILITY S202, S202 (2006) (noting that males are a contributory factor in 30-40% of infertility cases).

90. See Merck Manual Home Edition, *supra* note 87; Human Fertilisation & Embryology Authority, *supra* note 87.

91. MARGARET MARSH & WANDA RONNER, *THE EMPTY CRADLE: INFERTILITY IN AMERICA FROM COLONIAL TIMES TO THE PRESENT* 2 (The Johns Hopkins University Press 1996). See also University of California San Francisco Medical Center, *Fertility, Infertility in Women, Treatment*, [http://www.ucsfhealth.org/adult/medical\\_services/womens\\_health/fertility/conditions/female/treatments.html](http://www.ucsfhealth.org/adult/medical_services/womens_health/fertility/conditions/female/treatments.html) (last visited Jan. 21, 2009) (noting inception dates for various IVF treatments and frequency of use in more recent years); Bio Medicine, *Questions Raised Over Safety of In-vitro Fertilization*, <http://www.bio-medicine.org/medicine-news/Questions-Raised-Over-Safety-of-In-vitro-Fertilization-22901-4> (last visited Jun. 29, 2007) ("In vitro fertilization is becoming increasingly popular.").

Among fertility treatments, *in vitro* fertilization treatments are unique because patients often must set aside three to four weeks for medical treatment.<sup>92</sup> Further, it is not unusual for treatments to fail the first time.<sup>93</sup> Accordingly, a female employee who undergoes *in vitro* fertilization treatments may take several large blocks of time off from work before she successfully becomes pregnant.<sup>94</sup>

## 2. Fertile Ground: How Courts Have Treated Cases Dealing With Fertility and Title VII

In *International Union, UAW v. Johnson Controls, Inc.* (*Johnson Controls*),<sup>95</sup> the Supreme Court considered whether employer Johnson Controls could exclude “fertile female employee[s] from certain jobs because of its concern for the health of the fetus the woman might conceive.”<sup>96</sup> Johnson Controls, a battery production company, maintained a production line manned by live employees.<sup>97</sup> The course of normal operations exposed these employees to lead.<sup>98</sup> Such exposure jeopardized their health and well-being.<sup>99</sup>

92. See MAYO CLINIC, MAYO CLINIC FAMILY HEALTH BOOK 1069-70 (Scott C. Litin ed., 3d ed. 2003) (detailing scope and nature of *in vitro* fertilization treatments).

93. See The Merck Manual of Medical Information Home Edition, *Fertilization Techniques*, <http://www.merck.com/mmhe/sec22/ch254/ch254f.html> (last visited Mar. 29, 2009) (explaining that “the chances of producing one full-term baby are only about [eighteen] to [twenty-five percent] each time eggs are placed in the uterus.”); Abington Reproductive Medicine, *In Vitro Fertilization, Why Pregnancy May Not Occur*, [http://www.abington-repromed.com/our\\_services/our\\_services.cfm?pid=2](http://www.abington-repromed.com/our_services/our_services.cfm?pid=2) (last visited Mar. 29, 2009) (explaining that *in vitro* fertilization treatments may fail for any number of reasons, including, but not limited to, misgauged timing of ovulation, unsuccessful attempts to gather eggs, abnormal or mishandled eggs, or poor implantation).

94. See Merck Manual of Medical Information, *supra* note 93 (denoting likelihood of full-term pregnancy with each *in vitro* treatment); MAYO CLINIC, *supra* note 92 (detailing length of time required for each treatment); Joanna Grossman, *If Employers Don't Provide Insurance Covering Infertility, Are They Guilty of Sex Discrimination? A Federal Appeals Court Says No*, FINDLAW.COM, Jan. 28, 2003, <http://writ.news.findlaw.com/grossman/20030128.html> (explaining costs, in terms of both time and money, to women who choose to undergo *in vitro* fertilization treatments).

95. 499 U.S. 187 (1991).

96. *Id.* at 190.

97. *Id.* at 191.

98. *Id.* at 190.

99. *Id.* (“Occupational exposure to lead entails health risks, including the risk of harm to any fetus carried by a female employee.”). Prior to banning fertile and pregnant women from jobs where exposure to lead was certain, Johnson Controls acknowledged the dangers inherent with such positions. *Id.* at 191. The Court noted that Johnson Controls:

emphasized that a woman who expected to have a child should not choose a job in which she would have such exposure. The company also required a woman who wished to be considered for employment to sign a statement that she had been advised of the risk of having a child while she was exposed to lead. The statement informed the woman that although there was evidence “that women exposed to lead have a higher rate of abortion,” this evidence was “not as clear [] as the relationship between cigarette smoking and cancer,” but that it was,

Accordingly, the company restricted its pool of eligible employees to men and infertile women.<sup>100</sup> Johnson's policy stemmed from a concern as to the lasting effects of lead exposure on a fertile woman's ability to later conceive children.<sup>101</sup>

The district court granted Johnson Controls' motion for summary judgment, and the Seventh Circuit Court of Appeals affirmed, concluding that the company's policy, while discriminatory, was valid as a Bona Fide Occupational Qualification (BFOQ).<sup>102</sup> Judges Cudahy, Posner, and Easterbrook each wrote separate dissenting opinions.<sup>103</sup> The dissenting judges did not believe that summary judgment was appropriate based on the record, and each agreed also that Johnson Controls' only defense was to claim that its policy was a BFOQ.<sup>104</sup>

The Supreme Court reversed and remanded, holding both that Johnson Controls' policy violated the gender-discrimination protections set forth by Title VII and was not a BFOQ.<sup>105</sup> The Court concluded that discrimination on the basis of fertility (or infertility) alone was not barred by Title VII or the PDA.<sup>106</sup> Instead, the Court reasoned that where an employer barred fertile women from jobs that would otherwise render them infertile, but did not bar fertile men from the same jobs under the same rationale, Title VII prohibited such action because it separated employees based on gender.<sup>107</sup>

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"medically speaking, just good sense not to run the risk if you want children and do not want to expose the unborn child to risk, however small . . . ."

*Id.* (internal citations omitted).

100. *Id.* at 192. Johnson Controls defined women "capable of bearing children" as "[a]ll women except those whose inability to bear children is medically documented." *Id.*

101. *Id.* at 190-92.

102. *Id.* at 194-95.

103. *Int'l Union, UAW, et al., v Johnson Controls, Inc.*, 886 F.2d 871, 901, 901-09, 909-21 (7th Cir. 1989) (stating each Judge's respective dissenting opinions).

104. *Johnson Controls*, 499 U.S. at 195-96 (summarizing dissenting arguments of circuit court).

105. *Id.* at 187.

106. *Id.* at 191-92. Johnson Controls effectively separated employees into two categories: (1) "women who are pregnant and/or capable of bearing children," and (2) everyone else. *Id.* at 191. By necessity, this second group included both men and women, because some women were neither pregnant nor were capable of bearing children in the future. *Id.* at 192. The Court further noted that:

Johnson Controls' policy classifies on the basis of gender and childbearing capacity, rather than fertility alone. Respondent does not seek to protect the unconceived children of all its employees. Despite evidence in the record about the debilitating effect of lead exposure on the male reproductive system, Johnson Controls is concerned only with the harms that may befall the unborn offspring of its female employees.

*Id.* at 198.

107. *Id.* at 199 ("We concluded . . . that Johnson Controls' policy is not neutral because it does not apply to the reproductive capacity of the company's male employees in the same way as it applies to that of the females.").

Since *Johnson Controls*, some commentators have argued that infertility treatments are or should be “related medical conditions” with deference to the PDA.<sup>108</sup> The courts, however, have held otherwise.<sup>109</sup> Most notably, the Second and Eighth Circuits have held that infertility treatments are not covered by the PDA in the arena of insurance coverage.<sup>110</sup> In *Krauel v. Iowa Methodist Medical Center*,<sup>111</sup> the Eighth Circuit reasoned that “the plain language of the PDA does not suggest that ‘related medical conditions’ should be extended to apply outside the context of ‘pregnancy’ and ‘childbirth.’”<sup>112</sup> Further, the court stated that “[p]regnancy and childbirth, which occur after conception, are strikingly different from infertility, which *prevents conception*.”<sup>113</sup> The court thus reasoned that discrimination based on infertility, in any context, fell outside of the PDA’s coverage “because it is not pregnancy, childbirth, or a related medical condition.”<sup>114</sup>

In *Saks v. Franklin Covey*,<sup>115</sup> the Second Circuit addressed a fact pattern similar to that in *Krauel*.<sup>116</sup> The plaintiff claimed that a medical plan violated the PDA because the plan failed to cover infertility treatments to the same extent that it covered other medical procedures.<sup>117</sup> The Circuit Court adopted the Supreme Court’s reasoning from *Johnson Controls* that infertility does not, of itself, invoke the protection of the PDA.<sup>118</sup> Instead, the court reasoned that for a condition to fall within the purview of the PDA the “condition must be

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108. See, e.g., Joanna Grossman, *Must Employers Who Cover Prescription Drugs Cover Contraception? The EEOC’s Position, the Courts’ Recent Rulings, States’ Limited Coverage, and the Need for a New Federal Statute*, FINDLAW.COM, Apr. 17, 2007, <http://writ.news.findlaw.com/grossman/20070417.html> (“[T]he PDA should extend to infertility . . . . If a woman is fired, or denied insurance coverage, because pregnancy, in her case, requires infertility treatments, then she has suffered pregnancy discrimination within the meaning of the PDA.”).

109. See *infra* notes 111-20 and related text.

110. See *infra* notes 111-20 and related text.

111. 95 F.3d 674 (8th Cir. 1996).

112. *Id.* at 679 (demonstrating circuit court’s view that the PDA applied only to issues occurring post-conception).

113. *Id.* (emphasis added) (holding that failure to include fertility treatments within insurance coverage was not gender-based discrimination under either Title VII or the PDA because infertility occurs pre-conception). The court further noted that “[t]he legislative history and the EEOC guidelines do not make any reference to infertility treatments.” *Id.*

114. *Id.* at 679-80.

115. 316 F.3d 337 (2d Cir. 2003).

116. *Id.* 340-42.

117. *Id.* at 342.

118. *Id.* at 345-46. As stated by the court:

[A]lthough discrimination based on “childbearing capacity” violates Title VII as modified by the PDA, discrimination based on “fertility alone” would not. We conclude that under this reasoning, for a condition to fall within the PDA’s inclusion of “pregnancy . . . and related medical conditions” as sex-based characteristics, that condition must be unique to women.”

*Id.* (internal citations omitted).

unique to women.”<sup>119</sup> In essence, the court adopted an asexual view of all infertility treatments since infertility affects roughly equal proportions of the male and female population.<sup>120</sup>

### III. FIRST WORDS: THE SEVENTH CIRCUIT HEARS *HALL V. NALCO* AS A CASE OF FIRST IMPRESSION

#### A. Facts and Procedural History

In 1997, Defendant Nalco Company hired Plaintiff Cheryl Hall.<sup>121</sup> In 2000, Hall was promoted to the position of Sales Secretary in one of Nalco's two Chicago area sales offices.<sup>122</sup> As sales secretary, Hall reported to district sales manager Marv Baldwin.<sup>123</sup> In turn, Baldwin reported to regional sales manager Geordie Hamilton.<sup>124</sup> Hamilton oversaw both Chicago area sales offices; Shana Dwyer worked as a sales secretary in Hamilton's other office.<sup>125</sup>

In January of 2003, Nalco, in an effort to cut costs, began reorganizing and consolidating its sales offices.<sup>126</sup> Nalco management decided to consolidate Hamilton's two Chicago area offices.<sup>127</sup> As part of the consolidation plan, Nalco executives decided to eliminate one of the two sales secretary positions.<sup>128</sup>

Meanwhile, in early 2003, Hall informed Baldwin that she intended to take time off to undergo an *in vitro* fertilization procedure.<sup>129</sup> In March of 2003, she formally requested time off from work.<sup>130</sup> Baldwin granted her

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119. *Id.* at 346.

120. As stated by the Second Circuit in *Saks v. Franklin Covey Co.*:

Including infertility within the PDA's protection as a "related medical condition" would result in the anomaly of defining a class that simultaneously includes equal numbers of both sexes and yet is somehow vulnerable to sex discrimination. Because such a result is incompatible with the PDA's purpose of clarifying the definition of "because of sex" and the Supreme Court's interpretation of the PDA in *Johnson Controls*, we hold that infertility standing alone does not fall within the meaning of the phrase "related medical conditions."

316 F.3d 337, 346 (2d Cir. 2003). See Insler & Lunenfeld, *supra* note 89; Male Infertility Best Practice Pol'y Comm., *supra* note 89.

121. *Hall v. Nalco Co.*, No. 04 C 7294, slip op. at 1 (N.D. Ill. Sept. 12, 2006), *rev'd* 534 F.3d 644 (7th Cir. 2008).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

request, and Hall was absent from work between late March and late April.<sup>131</sup> The first *in vitro* treatment was unsuccessful.<sup>132</sup> Hall notified Baldwin shortly after her return that she planned a second leave of absence for another *in vitro* treatment and filed a formal request on July 21, 2003.<sup>133</sup>

At the end of July, after Hall filed her request for a second leave of absence, Baldwin informed Hall that the Chicago offices were merging.<sup>134</sup> He also let her know that Nalco would only retain one sales secretary, and that the company elected to retain Dwyer rather than Hall.<sup>135</sup> Baldwin told Hall during this conversation that the termination “was in [her] best interest due to [her] health condition.”<sup>136</sup> Sometime before Baldwin informed Hall that she was being terminated, Baldwin talked it over with employee-relations manager Jacqueline Bonin.<sup>137</sup> Bonin’s notes reflect that Hall “missed a lot of work due to health” and “absenteeism—fertility treatments.”<sup>138</sup>

In early August of 2003, Hall followed up with Baldwin to ask about her request for a leave of absence.<sup>139</sup> She did not receive a direct answer from him.<sup>140</sup> Instead, Baldwin informed Hall on August 6 that Nalco had formally terminated her position effective August 30, 2003.<sup>141</sup>

Hall filed an employment discrimination charge with the Equal Employment Opportunity Commission (EEOC) in March of 2004.<sup>142</sup> She received an EEOC Dismissal and Notice of Right to Sue in August, and she filed her complaint with the Northern District of Illinois in November of that same year.<sup>143</sup> In her complaint, in compliance with the Title VII requirements, Hall alleged that she was a member of a protected class and that her employer discriminated against her on the basis of membership within that class.<sup>144</sup> She

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131. *Id.*

132. *Id.*

133. *Id.* It is not unusual that the first treatment did not succeed. MAYO CLINIC, *supra* note 92 (noting that, to achieve successful *in vitro* impregnation, the patient must often take several periods off from work to undergo multiple treatments).

134. *Hall*, No. 04 C 7294, slip op. at 1.

135. *Id.* The sales secretary that Nalco decided to retain was female but, since 1988, had been incapable of becoming pregnant. *Hall*, 534 F.3d at 646.

136. *Hall*, 534 F.3d at 646.

137. *Id.*

138. *Id.* For commentary relating to Jacqueline Bonin’s records of Hall and Bonin’s conversations with Baldwin regarding Hall’s upcoming termination, see Ohio Employer’s Law Blog, *Employee fired for taking time off to undergo in vitro fertilization allowed to proceed with sex discrimination claim* (Jul. 18, 2008), <http://ohioemploymentlaw.blogspot.com/2008/07/employee-fired-for-taking-time-off-to.html> (reflecting on Bonin’s notes and commenting that “[s]ometimes, too much documentation is a bad thing”).

139. *Hall*, No. 04 C 7294, slip op. at 1.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 2.

alleged that, as a female with a pregnancy-related condition, she was a member of a protected class.<sup>145</sup> The district court granted summary judgment for Nalco.<sup>146</sup> It based its ruling in large part on the Second Circuit's reasoning in *Saks*,<sup>147</sup> holding that infertile women were not a protected class because the court found that infertility is a gender-neutral condition.<sup>148</sup>

#### *B. The Seventh Circuit's Analysis*

The Seventh Circuit Court of Appeals recognized *Hall* as a case of first impression within the Federal courts of appeal.<sup>149</sup> The circuit court also noted that the district court, by dispensing with *Hall*'s case on summary judgment, did not reach or discuss the merits of *Hall*'s claims.<sup>150</sup> The circuit court further recognized Title VII's requirement that the plaintiff, in order to defeat a motion for summary judgment, must allege discrimination based on the plaintiff's membership in a protected class.<sup>151</sup> Accordingly, the circuit court began its discussion by analyzing whether *Hall* properly presented a cognizable claim under Title VII and, as the District Court analyzed, under the amendments set forth by the PDA.<sup>152</sup>

The circuit court agreed with the lower court's determination that, under Title VII, an employer cannot discriminate on the basis of gender.<sup>153</sup> It further reasoned that the PDA did not add any new rights or protections; instead, it merely clarified that pregnancy-based discrimination is inherently gender-based discrimination.<sup>154</sup> The court emphasized that the PDA offers protection from

145. *Hall*, 534 F.3d at 646.

146. *Hall*, No. 04 C 7294, slip op. at 2.

147. *Id.* (noting that while the Seventh Circuit had yet to directly address whether infertility, standing alone, was enough to invoke Title VII protections, several other circuits had ruled on the matter and the court would afford those circuit decisions much weight). As the court stated:

While the cited cases address Title VII insurance coverage claims, the reasoning equally applies to Title VII adverse employment actions based on infertility. The Plaintiff alleges that she was terminated because she was undergoing infertility treatments. As stated above, infertility alone does not fall within "related medical conditions" of the PDA, and seeking infertility treatment does not give rise to grounds for sex discrimination. The fact that the Plaintiff happens to be a woman in the present case does not qualify her for protection under Title VII. Thus, the plaintiff does not fall within a protected class.

*Id.*

148. *Id.*

149. *Hall*, 534 F.3d at 646.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* ("The PDA created no new rights or remedies, but clarified the scope of Title VII by recognizing certain inherently gender-specific characteristics that may not form the basis for disparate treatment of employees" (citing *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678-79 (1983)). "The PDA 'made clear that, for all Title VII

gender discrimination stemming from “pregnancy, childbirth, or related medical conditions.”<sup>155</sup>

The court noted the district court’s reliance on *Saks* and *Krauel* for the proposition that infertility is a gender-neutral condition.<sup>156</sup> The court, however, stated that the district court failed to accord these holdings or give appropriate weight to the Supreme Court’s treatment of infertility and gender in *Johnson Controls*.<sup>157</sup> As stated by the court:

Nalco’s conduct, viewed in the light most favorable to Hall, suffers from the same defect as the policy in *Johnson Controls*. Employees terminated for taking time off to undergo IVF—just like those terminated for taking time off to give birth or receive other pregnancy-related care—will always be women. This is necessarily so; IVF is one of several assisted reproductive technologies that involves a surgical impregnation procedure. Thus, contrary to the district court’s conclusion, Hall was terminated not for the gender-neutral condition of infertility, but rather for the gender-specific quality of childbearing capacity.<sup>158</sup>

The court further stated that “employment action[s] based on childbearing capacity will always result in ‘treatment of a person in a manner which but for that person’s sex would be different.’”<sup>159</sup> Thus, it found that Hall presented a cognizable gender discrimination claim under Title VII.<sup>160</sup> Accordingly, the court reversed the holding and remanded to the district court for new proceedings.<sup>161</sup>

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purposes, discrimination based on a woman’s pregnancy is, on its face, discrimination because of her sex.” *Id.* (citing *Newport News*, 462 U.S. at 684).

155. *Id.*

156. *Id.* at 647-48.

157. *Id.* at 648 (“The district court’s emphasis . . . is therefore misplaced in the factual context of this case. As *Johnson Controls* illustrates, even where (in)fertility is at issue, the employer conduct complained of must actually *be gender neutral* to pass muster.”).

158. *Id.* at 648-49 (citations omitted).

159. *Id.*

160. *Id.*

161. *Id.* The circuit’s decision was informed, in part, by other district court cases dealing with similar facts and circumstances. *Erickson v. Bd. of Governors*, 911 F.Supp. 316 (N.D. Ill. 1995) (finding that termination of employee for undergoing infertility treatments was barred by Title VII); *Pacourek v. Inland Steel Co.*, 858 F.Supp. 1393, 1403 (N.D. Ill. 1994) (noting that employee discharge was inappropriate where it was based on *in vitro* fertilization treatments because “employers are to treat a woman’s medical infertility with neutrality – the same general command of the PDA regarding pregnancy itself.”).

## IV. ANALYSIS

*A. While the Court Correctly Reversed and Remanded the Case, Hall Presents Complications*

Although Hall's complaint was poorly construed, the circuit court properly reversed the district court's decision and remanded the matter for further review.<sup>162</sup> The court correctly found that "females with a pregnancy related condition, infertility," are not a protected class within the meaning of Title VII, with or without regard to the PDA.<sup>163</sup> Hall, however, had a cognizable sex discrimination claim because she presented facts sufficient to support a triable, material issue to for a jury.<sup>164</sup> As the circuit court noted, its decision is appropriately guided by findings of the Northern District of Illinois in the mid 1990's.<sup>165</sup>

That is not to say, however, that Hall would necessarily succeed if the district court revisited her case.<sup>166</sup> Reversal of summary judgment simply means that the trial court erred in finding that Hall did not present a triable question of fact.<sup>167</sup> Nalco would likely argue that it reasonably sought to reduce its operating expenses and, as a result, had to eliminate one of two sales secretaries.<sup>168</sup> Accordingly, Hall would likely lose if she raised the simple "but for" test espoused in *Newport News* because Nalco can demonstrate that it eliminated her position for, at least in part, reasons unrelated to her gender.<sup>169</sup>

162. See FED. R. CIV. P. 56(c) ("The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."). Where, a definite conclusion cannot be drawn from the facts as presented summary judgment is inappropriate. See, e.g., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

163. See 42 U.S.C. § 2000e-2(a)(1) (2007) (noting protected classes as "race, color, religion, sex or national origin").

164. Compare Brief of Plaintiff-Appellant at 3-6, *Hall v. Nalco Co.*, No. 06-3684 (7th Cir. Jun. 4, 2007) (presenting Cheryl Hall's version of facts) with Brief of Defendant-Appellee at 3-6, *Hall v. Nalco Co.*, No. 06-3684 (7th Cir. Jun. 4, 2007) (presenting Nalco's version of facts in same case).

165. *Hall*, 534 F.3d at 649 (recognizing and according decisions from earlier district court cases which recognized that termination based on (in)fertility was pregnancy-related and, thus, gender-related discrimination).

166. Robert J. Gregory, *One Too Many Rivers to Cross: Rule 50 Practice in the Modern Era of Summary Judgment*, 23 FLA. ST. U. L. REV. 689, 689 n.146 (1996) ("A denial of summary judgment does not entitle the plaintiff to a favorable reception by the jury.").

167. See FED. R. CIV. P. 56(c), *supra* note 162.

168. See Brief of Defendant-Appellee, *supra* note 164 (detailing Defendant Nalco Co.'s arguments for previous oral argument).

169. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 683 (1983) (delineating "but for" test for sex discrimination cases raised under Title VII).

At best Hall could thus pursue a mixed motive case and, based on the same facts that Nalco would use to overcome a simple "but for" charge, Hall's case would not go unchallenged.<sup>170</sup>

Further, Nalco would be wise to attempt to establish that the consolidated sales secretary position required a BFOQ.<sup>171</sup> The *Maldonado* court clarified that while employers could not base decisions on presumed employee needs relating to pregnancy, they could base such decisions on actual requests for time off from work.<sup>172</sup> The caveat, of course, is that the employer's decision must be based on a BFOQ.<sup>173</sup> Thus, if Nalco demonstrated that the sales secretary position was qualified by the need to avoid frequent absenteeism, Hall would struggle to make her case.<sup>174</sup>

*B. The Seventh Circuit Lent More "Baby Weight" to the PDA Than Ultimately Was Appropriate: the Court's Interpretation of Pregnancy-Related Conditions Stretches Beyond the Intended Scope of the Act*

Courts have been very careful to stress that the PDA added nothing new to Title VII.<sup>175</sup> Instead, the PDA clarified that discrimination based on pregnancy is, inherently, gender discrimination because only women can become pregnant and give birth.<sup>176</sup> Accordingly, extending Title VII protection to fertility

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170. See ZIMMER, SULLIVAN & HANNER WHITE, *supra* note 40, at 42-43, 172-73 (explaining basis for "mixed motive" test, and bases plaintiff may use in Title VII discrimination cases). In Hall's case, she may present either direct or circumstantial evidence of discrimination alongside any legitimate interest that Nalco had in eliminating her position for financial reasons.

171. See *Maldonado v. U.S. Bank*, 186 F.3d 759, 763 (7th Cir. 1999) (noting that employers may discriminate if discriminatory practices are supported by a BFOQ).

172. See *id.*

173. See 42 U.S.C. § 2000e-2(e)(1) (2000); ZIMMER, SULLIVAN & HANNER WHITE, *supra* note 40. See also *Maldonado*, 186 F.3d at 767 ("Although the PDA was designed to allow individual women to make independent choices about whether to continue to work while pregnant, it was not designed to handcuff employers by forcing them to wait until an employee's pregnancy causes a special economic disadvantage.").

174. See ZIMMER, SULLIVAN & HANNER WHITE, *supra* note 40, at 173 (discussing burdens in mixed motive cases). When the author first drafted this note, Hall's case was set for trial at the district level; shortly before publication, the parties settled. Email from Eugene Hollander, Attorney for Cheryl Hall, to author (Oct. 6, 2008, 8:18 EST) (on file with author) (noting the date for Hall's pending trial); email from Eugene Hollander to author (Mar. 2, 2009, 10:02 EST) (on file with author) (noting that Hall's trial had settled).

175. See *Int'l Union v. Johnson Controls*, 499 U.S. 187, 199 (1999) ("The PDA has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex" (quoting *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983))).

176. MERCK MANUAL OF MEDICAL INFORMATION HOME EDITION 1437-41 (Mark H. Beers ed., 2d ed. 2003) (1997), available at <http://www.merck.com/mmhe/sec22/ch257/ch257d.html> (discussing physical impacts and complications arising from pregnancy, which, clearly, only impact women as only women can become pregnant).

treatments, as the Seventh Circuit Court of Appeals did in Hall's case, stretches Title VII protection beyond Congressional intent for the PDA.<sup>177</sup>

In *Johnson Controls*, the Supreme Court recognized infertility as a gender-neutral condition.<sup>178</sup> The Court, however, also found if the employer discriminates against only women on the basis of infertility, such discrimination is barred by Title VII.<sup>179</sup> Thus, the Court ultimately held that Johnson Controls' policy was discriminatory because it limited employee rights based on each employee's gender.<sup>180</sup> The Court concluded that any consideration that Johnson Controls gave to the employee's fertility was, for discriminatory purposes, at best ancillary.<sup>181</sup>

Thus, when an employee files discrimination charges against an employer based on the employee's fertility, the employee's claim must fail unless he or she can also demonstrate some gender-bias on the part of the employer.<sup>182</sup> Discrimination based on an employee's election to undergo *in vitro* fertilization treatments presents an interesting question, then, because only women can undergo *in vitro* treatments.<sup>183</sup> It is enough, at least, to provide the courts with a pregnant pause for thought.<sup>184</sup>

Nevertheless, with respect to the PDA, the Court cut the cord between *in vitro* fertilization and pregnancy over a decade ago.<sup>185</sup> Recognition of infertility as a gender-neutral condition precludes cognizable discrimination

177. See *Johnson Controls*, 499 U.S. at 199 (clarifying that Congress' intent in enacting the PDA was only to clarify, and not to expand, Title VII protection against sex discrimination).

178. For an examination of the Court's conclusion that discrimination on the basis of infertility alone did not violate Title VII, see *supra* notes 105-07 and related text.

179. For a discussion of the Court's holding and rationale in *Johnson Controls*, see *id.*

180. *Johnson Controls*, 499 U.S. at 187 ("By excluding women with childbearing capacity from lead-exposed jobs, respondent's policy creates a facial classification based on gender and explicitly discriminates against women on the basis of their sex under § 703(a) of Title VII.").

181. *Id.* at 197-99 (emphasizing that the Court's decision rests on sex-based discrimination). In *Johnson*, the Court rested its decision on the separation between the sexes rather than a distinction drawn upon an employee's or group of employees' (in)fertility. *Id.*

182. *Id.*

183. MAYO CLINIC, *supra* note 92.

184. See Mitchell H. Rubenstein, 7th In Case of First Impression Holds Secy Fired for Taking Time Off From Working For In Vitro Fertilization States a Cause of Action Under Title VII, ADJUNCT LAW PROF BLOG, July 22, 2008, <http://lawprofessors.typepad.com/adjunctprofs/2008/07/7th-in-case-of.html> (recognizing potential issues which arise as result of Seventh Circuit's decision in *Hall*). This note recognizes the potential consequences of the Hall decision. For such discussion, see *infra* notes 185-91 and related text.

185. See *Johnson Controls*, 499 U.S. at 198 (suggesting that discrimination based on (in)fertility alone does not implicate Title VII protections). Note, however, that the Court concluded that "the language of . . . the PDA . . . as well as the legislative history and the case law, prohibit an employer from discriminating against a woman because of her capacity to become pregnant *unless her reproductive potential prevents her from performing the duties of her job.*" *Id.* at 206 (emphasis added).

claims where the plaintiff fails to also demonstrate gender-based discrimination.<sup>186</sup> To honor *Johnson Controls*, circuit decisions which recognize infertility treatments as gender neutral, and Congress' intent in enacting the PDA, future courts must recognize *in vitro* fertilization treatments for what they are—merely one of many gender-neutral procedures which do not invite Title VII protections.<sup>187</sup>

To consider otherwise opens a door to meritless claims.<sup>188</sup> Consider the case of a man, suffering from testicular complications, who wishes to undergo treatment to restore his fertility. Testicular issues are gender-specific and such issues likely impact fertility.<sup>189</sup> Nevertheless, any claim this man brings under the PDA must fail.<sup>190</sup> Despite the gender-specificity of male infertility issues, several circuit courts recognize that both male and female fertility treatments fall under a general umbrella of gender-neutrality.<sup>191</sup> Further, extending a man protection under the PDA contradicts clear statements of Congressional intent and prior judicial interpretation of the PDA.

This example demonstrates the dangers inherent in the circuit court's reasoning. The gentleman in this example, after *Hall*, has a cognizable claim because his condition is inherently gender-specific and relates directly to pregnancy.<sup>192</sup> The *Hall* decision invites faulty reasoning where social values conflict with judicial precedent.

Nevertheless, women who undergo *in vitro* fertilization, and subsequently face employment discrimination, may still pursue claims under Title VII.<sup>193</sup> As was the case before the *Hall* decision, such plaintiffs should raise such claims on evidence of actual, gender-based discrimination. On a case-by-case basis, the EEOC and courts must review the underlying facts to determine validity.

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186. *Id.*

187. See *Saks v. Franklin Covey Co.*, 316 F.3d 337, 346 (2d. Cir. 2003) ("Including infertility within the PDA's protection . . . would result in the anomaly of defining a class that simultaneously includes equal numbers of both sexes and yet is somehow vulnerable to sex discrimination.").

188. See *Johnson Controls*, 499 U.S. at 199 ("The PDA has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex.") (citations omitted and emphasis added). Accordingly, allowing a man to file claims under the PDA would be foolish, at best. See *id.* (emphasizing the PDA's role as protective device for women).

189. See Merck Manual Home Edition, Introduction, *Biology of the Male Reproductive System*, <http://www.merck.com/mmhe/sec22/ch254/ch254a.html?qt=infertility&alt=sh> (last visited Mar. 29, 2009) (noting that testicles, which are unique to male biology, produce sperm which play key role in human reproduction).

190. For a discussion of the reasoning that supports this claim, see *supra* notes 175-87 and related text.

191. For an explanation of Congress' intent in enacting the PDA, see *supra* notes 23-28 and related text.

192. See *Hall v. Nalco Co.*, 534 F.3d 644, 646-49 (2008).

193. See generally *Johnson Controls*, 499 U.S. at 198 (demonstrating that discrimination based on infertility, when coupled with sex-based discrimination, potentially provides context for properly raised discrimination charges).

## V. CONCLUSION

Academia and pop culture have recognized the many problems that women face in the workplace.<sup>194</sup> Although women represent a significant portion of the American labor force,<sup>195</sup> as a group they have fought an uphill battle for many years and will likely continue to struggle in the coming years.<sup>196</sup> While women today enjoy greater educational and professional opportunities,<sup>197</sup> they still face work-related challenges that men do not face or face to a far lesser extent.<sup>198</sup> Thus, the PDA remains at the forefront of the legal and business community's mind.<sup>199</sup>

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194. See, e.g., Feminism and Women's Studies, *Women in the Professions*, <http://feminism.eserver.org/workplace/professions> (last visited Mar. 29, 2009) (providing articles relevant to women's issues in scientific, military, political, and technical professions); *The Office: Boys and Girls* (NBC television broadcast Feb. 2, 2006) (satirizing women's issues in workplace). As Michael Scott, the officer manager of a regional paper supply company, said, "What is more important than quality? Equality. Now, studies show that today's woman, the Ally McBeal woman, as I call her, is at a crossroads. . . . You have come a long way, baby." *Id.*

195. For notes and commentary on the percentage of women in the American work force, see *supra* notes 4-5 and related text.

196. See *Women in Business: Helping Women Get to the Top*, ECONOMIST, July 23, 2005, at 11 (noting that while women account for nearly half of the global work force they account for very few positions in senior management at large corporations). As stated:

For every ten men in the executive suite there is one woman, a ratio that has changed little since the term "the glass ceiling" was coined two decades ago to describe the barrier that allows women to see the top of the corporate ladder, but seems to stop them from reaching it. Despite much discussion, and efforts by both women's and business groups to break that barrier down, the world's biggest companies are still almost exclusively run by men.

*Id.*

197. For discussion of women's educational and professional opportunities, see *supra* notes 2-5 and related text.

198. See generally KAREN SALMANSON, *HOW TO SUCCEED IN BUSINESS WITHOUT A PENIS: SECRETS AND STRATEGIES FOR THE WORKING WOMAN* (1996) (describing difficulties that women face in working world and suggesting various ways for women to overcome such obstacles).

199. See generally Manning Magid, *supra* note 69 (discussing current impact of the Pregnancy Discrimination Act); see also Yale Journal of Law and Feminism, *Respecting Expecting: The 30th Anniversary of the PDA*, <http://www.acteva.com/booking.cfm?bevaID=168378&CFID=12088846&CFTOKEN=80887279> (last visited Oct. 14, 2008) (inviting attendees to symposium held in honor of the PDA's thirtieth anniversary, in order to discuss modern issues arising under the Act); Marcia L. McCormick, *Seventh Circuit Holds that Termination for Infertility Treatment Is Sex Discrimination*, WORKPLACE PROF BLOG, July 21, 2008, [http://lawprofessors.typepad.com/laborprof\\_blog/2008/07/seventh-circu-1.html](http://lawprofessors.typepad.com/laborprof_blog/2008/07/seventh-circu-1.html) (discussing possible legal ramifications of recognition of gender-specific fertility issues and treatments under the PDA).

Employers also face considerable hurdles when balancing their interests against those of individual employees.<sup>200</sup> Although employers may raise a BFOQ defense against discrimination claims, such defenses may anger other employees or the surrounding community and thus subject the employer to negative publicity.<sup>201</sup> Additionally, employers should take care in how they address individual employee issues and terminations.<sup>202</sup> Hall's case demonstrates the need for balance between competing employer and employee interests.<sup>203</sup>

Ultimately, the seventh circuit's improper interpretation of the PDA provides district courts with faulty rationale for future cases, particularly since Hall and Nalco settled before the district court could apply the circuit court's methodology.<sup>204</sup> An examination of most infertility treatments reveals that they are inherently gender-related; after all, fertility treatments necessarily involve gender-specific organs and procedures relating to reproduction.<sup>205</sup> The PDA was enacted, however, to merely clarify that discrimination on the basis of pregnancy, childbirth or related procedures was discrimination against women.<sup>206</sup> Accordingly, courts must treat all infertility treatments as being gender-neutral.<sup>207</sup> Expanding the PDA to otherwise cover "gender-specific"

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200. See generally Lisa A. Baker, Law Enforcement Bulletins, *Pregnancy Discrimination Act Guarantee of Equal Treatment, Not Preferential Treatment*, <http://www.fbi.gov/publications/leb/2008/march2008/march2008leb.htm> (last visited Oct. 16, 2008) (discussing balance of employer and employee interests under full scope of the PDA).

201. For a discussion of BFOQs and their impact on employment discrimination claims, see *supra* note 85 and related text.

202. See Ohio Employer's Law Blog, *supra* note 138 (demonstrating conflict between employer's conflicting need to maintain accurate records and protect itself against potential lawsuits).

203. See *id.* (demonstrating such conflict). Discrimination claims aside, Nalco acted within its rights in trying to balance its own interests--corporate reorganization and record-keeping--against those of its employees. See *Hall v. Nalco Co.*, No. 04 C 7294, slip op. at 1 (N.D. Ill. Sept. 12, 2006), *rev'd* 534 F.3d 644 (7th Cir. 2008).

204. See *Hall v. Nalco Co.*, 534 F.3d 644, 646-49 (2008) (discussing precedent and concluding that discrimination based on *in vitro* fertilization treatments was barred by Title VII as amended by the PDA); *supra* note 174 (noting that Hall and Nalco settled their lawsuit). For a discussion as to the appropriateness or validity of the Seventh Circuit's holding, see *supra* notes 175-93 and related text.

205. For examples of the gender-specificity inherent in fertility treatments, see *supra* notes 92-94, 189 and related text.

206. The historical backdrop of the PDA reveals Congress' intent to protect women from pregnancy-related discrimination. For background information leading to the inception of the PDA, see *supra* notes 60-64, 67-71. For similar comments from the Congressional Record, see *supra* note 72.

207. For analysis backing the conclusion that courts should treat infertility treatments as gender-neutral, see *supra* notes 118, 120 and related text.

infertility treatments invites ludicrous results, and extends the scope of the PDA well beyond Congressional and judicial intent.<sup>208</sup>

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208. For discussion and analysis pertaining to the inappropriate treatment of fertility treatments as gender-specific, and the appropriateness of a "gender-neutral umbrella" covering such treatments, *see supra* notes 178-193 and related text.